

This Opinion is not a
Precedent of the TTAB

Mailed: June 21, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re David Mottinger

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Serial No. 87222396

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Gene Bolmarcich, Law Offices of Gene Bolmarcich,
for David Mottinger.

Jonathan Robert Falk, Trademark Examining Attorney, Law Office 111,
Daniel Brody, Managing Attorney.

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Before Zervas, Ritchie, and Wolfson,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

David Mottinger (“Applicant”) seeks registration on the Principal Register of the standard character mark GUARDIAN AUDIO (“Audio” disclaimed) for “audio equipment for use in commercial entertainment systems for use in large public venues, namely, amplifiers, speakers, receivers; all of the foregoing sold only to sound contractors for commercial installation, and to sound production companies, and none

of which are targeted to or designed for use by the general consuming public” in International Class 9.¹

The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on Registration No. 4871240 for the standard character mark EGUARDIAN on the Principal Register for goods and services in International Classes 9, 14, 35, 38, 42 and 45.² The Examining Attorney focuses on the following Class 9 goods identified in the cited registration:

appliances and consumer electronic devices, namely, televisions, digital music players, mp3 players, stereos, cd players, audio and video recorders, DVD burners, DVD players, DVD recorders, creators in the nature of DVD drives, DVD burners, personal digital devices in the nature of personal digital assistants, VCR’s, digital cameras and digital video recorders, cellular phones, home theater products in the nature of LCD, video game programs, audio drivers, video drivers, video cameras.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Both Applicant and the Examining Attorney filed briefs. We affirm the refusal to register.

I. LIKELIHOOD OF CONFUSION

Our determination under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177

¹ Application Serial No. 87222396, filed on November 1, 2016, alleging first use and first use in commerce on January 28, 2008, pursuant to Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

² Registration No. 4871240, registered December 15, 2015.

USPQ 563 (CCPA 1973); *see also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014). “Not all of the [*du Pont*] factors are relevant to every case, and only factors of significance to the particular mark need be considered.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1719 (Fed. Cir. 2012) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)).

A. The Similarity or Dissimilarity of the Marks.

We compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay Imps.*, 73 USPQ2d at 1692. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs.*, 101 USPQ2d at 1721. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB

1980). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the United States Army*, 85 USPQ2d 1264 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. Vv. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, different features may be analyzed to determine whether the marks are similar. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013) (citing *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955)). In fact, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat'l Data Corp.*, 224 USPQ at 751.

Applicant’s mark is GUARDIAN AUDIO in standard characters. As the first and only distinctive portion of Applicant’s mark, the term GUARDIAN is its dominant element. Consumers are generally inclined to focus on the first word, prefix, or

syllable in any trademark or service mark. *See Palm Bay Imps.*, 73 USPQ2d at 1692 (“VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) (“[T]he dominance of BARR in [a]pplicant’s mark BARR GROUP is reinforced by its location as the first word in the mark.”). The term AUDIO in the mark is less significant since it is descriptive of Applicant’s audio equipment and has been appropriately disclaimed. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dixie Rest. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

The cited mark is EGUARDIAN. It too is dominated by the term GUARDIAN. While the term EGUARDIAN is not itself a recognized word, it is composed of the recognized word GUARDIAN and the single-letter prefix “E.” The term GUARDIAN is at worst suggestive of Registrant’s protective electronic devices and its computer security and signature verification services. On the other hand, the term is arbitrary with respect to the goods on which the Examining Attorney focuses. There is no evidence of commercial weakness; indeed Applicant did not submit any evidence in this proceeding. Regarding the letter “e,” as Applicant acknowledges, the letter “e” “generally refer[s] to electronics,” 4 TTABVUE 4,³ and thus merely describes a feature of Registrant’s electronic devices and related services. As such, the “e-” prefix has less

³ *See also* CAMBRIDGE ENGLISH DICTIONARY at <https://dictionary.cambridge.org>. (noting use of “e” in e-commerce, e-mail, e-banking as abbreviation for “electronic”); accessed June 17, 2018. Judicial notice may be taken of dictionary evidence. *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

source-identifying significance than the term GUARDIAN, even though it appears as a prefix in the mark. Moreover, even though Applicant's mark comprises two words and the Registrant's mark is one term, the marks create similar commercial impressions when considered in their entireties due to the dominant impression created by the inherently distinctive term GUARDIAN in both marks. The additions of the term AUDIO in Applicant's mark and the letter "E" in Registrant's mark do not detract from the overall similarity of the marks. Applicant's mark is similar in appearance, pronunciation, connotation, and overall commercial impression to the cited mark due to the shared term "GUARDIAN."

The *du Pont* factor regarding the similarity of the marks favors a finding of likelihood of confusion.

B. The Similarity or Dissimilarity and Nature of the Goods and Services.

We turn next to the similarity between the respective goods and services, and consider the goods and services as they are identified in the application and the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (goods as identified in involved application and cited registration compared); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). In determining whether the goods and services are related, it is not necessary that the goods or services at issue be identical or competitive in character to support a holding of likelihood of confusion; it is sufficient for such purposes that they are related in some manner and/or that conditions and activities surrounding their marketing are such that they

would or could be encountered by the same persons under circumstances that could, because of similarities of marks used with them, give rise to the mistaken belief that they originate from or are in some way associated with the same producer. *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *Schering Corporation v. Alza Corporation*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corporation v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978).

Applicant is seeking to register its mark for “audio equipment for use in commercial entertainment systems for use in large public venues, namely, amplifiers, speakers, receivers; all of the foregoing sold only to sound contractors for commercial installation, and to sound production companies, and none of which are targeted to or designed for use by the general consuming public.” The relevant Class 9 goods identified in the cited registration are:

appliances and consumer electronic devices, namely, televisions, digital music players, mp3 players, stereos, cd players, audio and video recorders, DVD burners, DVD players, DVD recorders, creators in the nature of DVD drives, DVD burners, personal digital devices in the nature of personal digital assistants, VCR's, digital cameras and digital video recorders, cellular phones, home theater products in the nature of LCD, video game programs, audio drivers, video drivers, video cameras.

It is unnecessary, for a finding of likelihood of confusion, that we find Applicant's goods to be related to all of the goods and services for which Registrant has registered its EGUARDIAN mark. Likelihood of confusion may be found, and the refusal to register may be affirmed, “if there is a likelihood of confusion involving any item that comes within the identification of goods in the involved application.” *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *Tuxedo Monopoly, Inc. v.*

Gen. Mills Fun Grp., 209 USPQ 986, 988 (CCPA 1981)). “It is therefore unnecessary to rule as to whether each of the other items set forth in the involved application are so related to those in the cited registration that confusion would be likely.” *Jump Designs*, 80 USPQ2d at 1374. Moreover, confusing similarity of the products themselves is not required. *Hercules, Inc. v. Nat’l Starch & Chem. Corp.*, 223 USPQ 1244, 1246 (TTAB 1984).

In support of the contention that Applicant’s goods and Registrant’s goods are related, the Examining Attorney submitted copies of web pages consisting of screenshots of products manufactured by Yamaha, Denon, Pyle, and Toshiba, Sony, and Bose, purporting to demonstrate that the same entity makes audio equipment for large venues and also makes consumer electronic devices for home use, and markets the goods under the same mark. For example:

- Yamaha produces a “YAMAHA 100W Bluetooth Stereo Receiver” for personal use, and a “YAMAHA StagePas 600i Portable PA System” that includes speakers, mixer stand, and microphone for use in public venues;⁴
- Denon produces a “Denon - AVR 5.2-Ch. 4K Ultra HD and 3D Pass-Through A/V Home Theater Receiver” for home use and a “Denon ENVOI-GO [B-STOCK MODEL] Portable AC/Battery-Powered PA System” that includes speakers for public use;⁵

⁴ Final Office Action of November 14, 2017 at TSDR 6-7.

⁵ *Id.* at TSDR 8-9.

- Pyle USA offers a “Pyle Home 300 Watt Digital Home Stereo Receiver System” and a “PyleHome PWMA 1090UI Wireless and Portable PA System” for public use;⁶
- Toshiba offers an HDTV television for home use and a “60W Portable Sound System” advertised for group entertainment;⁷
- Sony offers a “High Power XB60 Portable Bluetooth Speaker” and a “50W Bluetooth Micro Music System;”⁸ and
- Bose offers an “F1 Model 812 Flexible Array Powered Loudspeaker” and a “Wave® SoundTouch® music system IV.”⁹

The Examining Attorney argues that these references show that a single entity manufactures electronic equipment for personal use and public address PA systems for professional use under a single mark. While we agree the evidence confirms the named companies sell electronic equipment that would be used by an ordinary consumer at home, it does not support a finding that the PA systems being sold would be used professionally. At best, the evidence shows televisions and stereos (Registrant’s goods) offered under the same mark as receivers and speakers (Applicant’s goods). However, the equipment identified in these web pages that is

⁶ *Id.* at TSDR 10-11.

⁷ *Id.* at TSDR 12-13.

⁸ *Id.* at TSDR 14-15.

⁹ *Id.* at TSDR 16-17. While the web pages for Sony and Bose indicate that Sony’s Bluetooth Speaker costs \$349.99 and the Bose Loudspeaker costs \$1,019.00, that is, that these are more expensive items, compare at n. 10 *infra*, whether the goods are for private or public use is unspecified.

being sold as part of a PA system appears to be generally inexpensive and likely purchased by ordinary consumers.¹⁰ This reduces the probative value of the evidence.

The Examining Attorney also submitted copies of seven third-party registrations showing the same mark registered for “amplifiers, speakers or receivers” and “public address system accessories” on the one hand, and “appliances and consumer electronic devices” such as televisions and cd players on the other. These registrations are:

- Reg. No. 5028271 for the mark **TTM** for, *inter alia*, “loudspeakers, headphones, microphones and cd players” and “public address (PA) and sound system accessories, namely, microphone stands, speaker stands, microphone cables, speaker cables, speaker boxes and sound mixers”;¹¹
- Reg. No. 5148848 for the mark **ACTIONMIC** for, *inter alia*, “loudspeakers, headphones, microphones and CD players” and “public address (PA) and sound system accessories, namely, microphone stands, speaker stands, microphone cables, speaker cables, speaker boxes and sound mixers”;¹²



- Reg. No. 5061007 for the mark **TREBLAB** for, *inter alia*, “consumer electronic products, namely, audio amplifiers, audio speakers, audio receivers, electrical audio and speaker cables and connectors, audio decoders, video decoders, speakers, power conversion devices, power converters, and power inverters; home theater systems comprising

¹⁰ For example, Toshiba’s sound system is advertised for \$149.99; PyleHome’s PA system for \$239.69; and Denon’s PA system for \$289.99.

¹¹ December 8, 2017 Denial of Request for Reconsideration at TSDR 2-4.

¹² *Id.* at TSDR 5-7.

speakers; loud speaker systems; loud speakers; loudspeakers, headphones, microphones and CD players; wireless indoor and outdoor speakers”;¹³

- Reg. No. 5257401 for the mark **BEARSTAR** for, *inter alia*, “loudspeakers, headphones, microphones and CD players; tape and videotape players; tape recorders” and “public address (PA) and sound system accessories, namely, microphone stands, speaker stands, microphone cables, speaker cables, speaker boxes and sound mixers”;



- Reg. No. 5272595 for the mark **DS18 TECHNOLOGIES** for, *inter alia*, “audio speakers; bass amplifiers; bass speakers; loud speaker systems; loud speakers; loudspeakers with built in amplifiers; monitor signal amplifiers; portable vibration speakers; power amplifiers; pre-amplifiers” and “public address (PA) and sound system accessories, namely, microphone stands, speaker stands, microphone cables, speaker cables, speaker boxes and sound mixers; racks for amplifiers; sound mixers with integrated amplifiers; sound systems comprising remote controls, amplifiers, loudspeakers and components therefor; speaker enclosures; speaker microphones; stands adapted for stereos and audio speakers; stereo amplifiers; wireless indoor and outdoor speakers;”



- Reg. No. 5208934 for the mark **MICGEEK** for, *inter alia*, “loudspeakers; loudspeakers, headphones, microphones and cd players; public address (PA) and sound system accessories, namely, microphone stands, speaker stands, microphone cables, speaker cables, speaker boxes and sound mixers; rechargeable electric batteries; sound systems comprising remote controls, amplifiers, loudspeakers and components therefor; wireless headsets for smartphones”;



- Reg. No. 5349614 for the mark **Mike.** for, *inter alia*, “public address (PA) and sound system accessories, namely, microphone stands, speaker stands, microphone cables, speaker cables, speaker boxes and sound mixers; loudspeakers, headphones, microphones and CD players; sound amplifiers;” and “sound systems comprising remote controls, amplifiers, loudspeakers and components therefor; consumer electronic

¹³ *Id.* at TSDR 8-10.

products, namely, audio amplifiers, audio speakers, audio receivers, electrical audio and speaker cables and connectors, audio decoders, video decoders, speakers, power conversion devices, power converters, and power inverters; home theater systems comprising electronic components, namely, DVD players, audio amplifiers and audio speakers.”

Third-party registrations which individually cover a number of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* 864 F.2d 149 (Fed. Cir. 1988). The third-party registrations support a finding that Applicant’s and Registrant’s goods are related for likelihood of confusion purposes in that the registrations cover electronic goods for home use as well as electronic goods for use in large public venues.

While the evidence is not extensive, it is adequate to support a finding that the second *du Pont* factor favors a finding of likelihood of confusion.

C. Established, likely-to-continue channels of trade

Registrant’s identification of goods does not include any explicit trade channel or purchaser limitations or restrictions. We must therefore treat them as available for use in commercial entertainment systems and for large public venues as well as for home or residential use. Even if we presume that “consumer electronic devices” are limited to home electronics, as Applicant asserts, the term “appliances” is not so limited. Thus, Registrant’s appliances (such as its televisions, stereos and audio and

video recorders) are presumed to move in all channels of trade normal for those goods, including for commercial installation, and to be available to all classes of purchasers for the listed goods, including sound contractors and sound production companies. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Thus, the restriction “sold only to sound contractors for commercial installation, and to sound production companies, and none of which are targeted to or designed for use by the general consuming public” in the application is not a material factor in our likelihood of analysis because Registrant’s description of goods is not restricted to any specific channels of trade.

II. CONCLUSION

Applicant’s mark GUARDIAN AUDIO and Registrant’s mark EGUARDIAN are similar in sound, meaning, appearance and commercial impression. The goods are related in part, and because Registrant’s goods are not restricted, may be presumed to travel in overlapping trade channels to some of the same purchasers. Because of these similarities, the fact that Applicant’s application has been restricted to specific trade channels does not avoid a likelihood of confusion.

Accordingly, Applicant’s mark GUARDIAN AUDIO for “audio equipment for use in commercial entertainment systems for use in large public venues, namely,

amplifiers, speakers, receivers; all of the foregoing sold only to sound contractors for commercial installation, and to sound production companies, and none of which are targeted to or designed for use by the general consuming public” is likely to be confused with Registrant’s mark EGUARDIAN for those goods identified in the registration as “appliances and consumer electronic devices.”

Decision: The refusal to register Applicant’s mark under Section 2(d) is affirmed.